UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 06-cv-01164 ADM/AJB

Chris Gregerson,

Plaintiff,

vs.

Vilana Financial, a Minnesota Corporation and Vilana Realty, Inc. a Minnesota Corporation;

Defendants,

Vilana Financial, Inc. a Minnesota Corporation; Vilana Realty, Inc. a Minnesota Corporation; and Andrew Vilenchik, a private individual,

Counterclaim Plaintiffs,

vs.

Chris Gregerson, individually and unknown Defendants X, Y and Z,

Counterclaim Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ANDREW VILENCHIK, VILANA FINANCIAL, INC. AND VILANA REALTY, INC.

Vilana Financial, Inc., (hereinafter "Vilana Financial"), Vilana Realty, Inc. (hereinafter "Realty") collectively "Defendants" and "Counterclaimants," and Andrew Vilenchik ("Vilenchik") submit the following Proposed Findings of Fact and Conclusions of Law.

PROCEDURAL HISTORY

1. Plaintiff commenced this action by filing his complaint in this court on March 27, 2006.

2. Plaintiff's Complaint contained one cause of action for copyright infringement related to image number 2891. Plaintiff later amended his complaint to include a claim for copyright infringement related to a second image number 2258.
3. Vilana Financial, Vilana Realty and Andrew Vilenchik, filed an answer and counterclaims in this matter which included counterclaim counts for Deceptive Trade Practices, Trade Mark Infringement, Interference with Contractual and Business Relations, Appropriation, Injunctive Relief and Unjust Enrichment.
4. By Order and Memorandum of August 31, 2007, the Court granted Andrew Vilenchik's motion for summary judgment and dismissed him from this case. The Court also dismissed counterclaims of Vilana Financial and Vilana Realty for Trade Mark Infringement and Unjust Enrichment.
5. This case was tried to the Court on November 5 and 6, 2007.
6. This proposed set of findings and conclusions of law is submitted to the Court for use in its decision on the remaining issues before it.

FINDINGS OF FACT

1. All of the Findings of Fact set forth herein have been proven by a preponderance of the evidence.
2. To the extent that the Court's Conclusions of Law include what may be considered Findings of Fact, they are incorporated herein by reference.
3. The Court finds that on or about March, 2004, Vilana Financial purchased a number of photographs along with some other graphics from an individual named Michael Zubitsky. The transaction was memorialized in a one page letter printed on Vilana Financial

letterhead and executed by a Michael Zubitsky with notary verification by Vladimir Kazaryan.

4. The Court finds that Vilana Financial used one of the images depicting a Minneapolis Skyline (#2891), which it purchased from Zubitsky, in a Qwest Dex phone book advertisement, which had a circulation of approximately 500,000 copies.
5. The Court finds that Vilana also used image 2891 in an advertisement with the Zerkalo newspaper from January, 2005 through June, 2005, which had a total circulation of 5,000 copies per month for the six month period.
6. The Court finds that Vilana, sometime in the summer of 2004, used image 2891 along with a second image 2258 in a one page company brochure of which approximately 1000 copies were printed.
7. The Court finds that Vilana Financial did not know that images 2891 and 2258 belonged to Plaintiff at the time of their use in Vilana's advertising.
8. The Court finds that Vilana Financial first learned of a possible infringement as to image 2891 on or about June 6, 2005.
9. The Court finds that Vilana Financial first learned of a possible infringement as to image 2258 on or about January, 2007, when that image was produced as part of a brochure in the discovery stages of this litigation.
10. Plaintiff testified, and the Court finds, that the two images at issue initially appeared on his "phototour.minneapolis.mn.us" website, which he created as a not for profit website dedicated to free exchange and posting of photographs.
11. The Court finds that both of Plaintiffs' images number 2891 and 2258 were initially available on the phototour.minneapolis.mn.us website free of charge to the public.

12. The Court finds that on or about June 6, 2005, Vilana Financial received a letter from Plaintiff regarding Vilana's alleged use of one of his photographs, image 2891, in its advertisement with Qwest Dex, seeking payment of $5,448.00 ($1,816.00 of actual claimed damages tripled by Plaintiff for unauthorized use) for Vilana Financial's use of the photograph in the Dex advertising.
13. The Court finds that Vilana Financial responded to Plaintiff that it had paid for and believed that it acquired the photo lawfully and questioned Plaintiff's motive given his exorbitant financial threat to demand $54,480.00 if payment was not by June 20, 2005.
14. The Court finds that Vilana Financial offered to pay Plaintiff $500.00 to resolve the matter, which amounted to 10 times Plaintiff's advertised price at the time for image 2891 as indicated on his website, cgstock.com.
15. The Court finds that, Plaintiff refused the offer and also failed to provide any evidence of his claimed ownership via copyright registration or any other information related to his demands.
16. The Court finds that Vilana Financial seized from any further use of Plaintiffs images after receipt of his June 6, 2005 letter.
17. The Court finds that, on June 22, 2005, Plaintiff filed suit against Vilana Financial in Hennepin County small claims court for copyright violations seeking $7,500. The small claims matter was dismissed by the court.
18. The Court finds that, shortly thereafter, Plaintiff set up a website at cgstock.com that attacked Vilana Financial, Vilana Realty and Andrew Vilenchik personally by way of posting of disparaging comments that portrayed Vilana Financial, Vilana Realty and

Andrew Vilenchik as thieves who were connected to the Russian mafia and engaged in fraudulent business conduct and involved predatory lending practices.

19. The Court finds that Plaintiff via his cgstock.com website also diverted potential and existing Vilana customers away from the Vilana Financial site and to Plaintiff's site by way of unlawful use of Defendants Service/Trade Marks and Trade Names that were hidden in the website's metatags.

20. The Court finds that, a metatag is part of a website that is not seen by the public. It is read by search engine web browsers like Google and Yahoo and used to classify the website.

21. The Court finds that Plaintiff is using Defendants' trade and service names in metatags for purposes of linking his commercial websites to any public internet search of Defendants' business or Andrew Vilenchik personally.

22. The Court finds that Plaintiff set up his website directed at Vilana Financial with the intent to sabotage Defendants' business by diverting business away from Vilana Financial and interfering with existing customer and vendor relationships.

23. The Court finds that Plaintiff submits articles, blogs and creates mirror websites using Vilana Financial's goodwill and intellectual property, that all link back to his cgstock.com website.

24. The Court finds that Plaintiff has benefited from search engines highly ranking his commercial photography web sites http://www.phototour.minneapolis.mn.us http://www.cgstock.com/ as a result of the additional traffic related to Vilana Financial and the use of its metatags.

25. The Court finds that Plaintiff's online photography business, based on the search engine search results, has received tremendous publicity at the detriment and expense of Defendants.
26. The Court finds that Plaintiff also uses his web site as an opportunity to maliciously disparage Defendants and those associated with them. As an example, even though Plaintiff has no first hand knowledge of Vilana Financial's business practices, he intentionally posts comments on his website encouraging potential Vilana Financial customers "to consider finding a mortgage elsewhere" and suggesting to current customers that Vilana Financial is involved in "illegal, fraudulent, or predatory loan practices" and that the company is run by the "Russian mafia," and involved in "prostitution." As another example, Plaintiff maintains comments on his website related to Mr. Vilenchik's girlfriend, Kate, referring to her as a prostitute, a pretty slut, "I mean b…job," "how much Andrew is charging for her" and the like.
27. The Court finds that Plaintiff has control over all of the content on his website and is able to filter, remove or modify all of the comments posted on the website.
28. The Court finds that Plaintiff has admitted the damaging nature of the his website content, but has claimed it to be protected by free speech; and has on several occasions, after requests to do so from the Defendants and the Court, removed or modified certain content on his website in order to mitigate it damaging effect.
29. The Court finds that Plaintiff has continuously refused Defendants request to remove the photograph of Andrew Vilenchik from his website and to discontinue the use of Vilana Financial and Vilana Realty trade names in his metatags.

30. The Court finds that Plaintiff has disparaged Vilana Financial in several emails to third parties, including but not limited to City Pages magazine, wherein he referred to Vilana as a company which is “a front for criminal financial exploitation of people" and which is run by an individual who is “extremely corrupt and unethical,” referring to Andrew Vilenchik.

31. Pauline Fischer testified, and the Court finds, that she has worked in the real estate industry for over twenty years and that she was employed for several years as an account executive with Stewart Title of Minnesota and oversaw numerous closings being handled by Stewart Title for clients of Vilana Financial.

32. Ms. Fischer testified, and the Court finds, that her contact person at Vilana Financial was Andrew Vilenchik, whom she found to be very professional as were the other employees of Vilana Financial with whom she came in contact.

33. Ms. Fischer testified, and the Court finds, that in late 2005, upper management at Stewart Title approached Fischer and started asking questions regarding the status of Vilana Financial, as a result of a significant drop in closing requests from the company and managements concern about Vilana Financial’s status in the brokerage and lending community.

34. Ms. Fischer testified, and the Court finds, that she brought up the concerns of Stewart Title management with Andrew Vilenchik who indicated that a website organized by Plaintiff, was diverting Vilana Financial customers to his website, wherein Vilana Financial was being defamed and customers discouraged from doing business with Vilana Financial.

35. Ms. Fischer testified, and the Court finds, that Fischer went on the internet and saw the website created by Plaintiff come up when she did a search for Vilana Financial, along with the various references by Plaintiff to Vilana Financial and Vilana Realty.

36. Ms. Fischer testified, and the Court finds, that based on her subsequent searches and inquiries, she believes that there is confusion amongst customers and individuals in the mortgage real estate business with respect to Plaintiff's website and the nature and purpose of the content involving Vilana Financial, which is detrimental to Vilana Financial and very hard to overcome given the competitive nature of the industry.

37. Chris Richardson, a former account executive with ING Mortgage in charge of both the Minnesota and Wisconsin regions testified, and the Court finds, that that he worked in the Wholesale Lending channel of ING Mortgage which funds residential mortgage loans received from a network of approved independent mortgage brokers.

38. Chris Richardson testified, and the Court finds, that as part of his work with ING Mortgage he maintained a business relationship with Vilana Financial and that his personal contact at Vilana Financial for the past two plus years was Andrew Vilenchik.

39. Chris Richardson testified, and the Court finds, that sometime in the fall of 2005, Chris Richardson conducted a search on the internet for Vilana Financial in order to review their updated list of services as part of the application process with ING.

40. Chris Richardson testified, and the Court finds, that when he did the search for Vilana Financial he was diverted to Plaintiff's website which contained a rant about Vilana and Andrew Vilenchik.

41. Chris Richardson testified, and the Court finds, that he read the content on Mr. Gregerson's website and was disturbed by the allegations and comments that were posted and perceived them to be damaging to Vilana Financial and its relationship with ING.
42. Chris Richardson testified, and the Court finds, that he contacted Andrew Vilenchik and received an explanation regarding the matters set forth on Plaintiff's website and was informed that Vilana Financial had hired an attorney deal with the issue.
43. Chris Richardson testified, and the Court so finds, that since the fall of 2005 the number of loan referrals from Vilana Financial had dropped, which he attributed at least in part to Plaintiff's website due to the level of the drop in business when compared to similarly situated companies.
44. Chris Richardson testified, and the Court so finds, that there is confusion amongst customers, brokers and lenders about the origin of Plaintiff's website and the nature and purpose of the content involving Vilana Financial, which is creating a negative and disparaging image of the company and has resulted in a decline in Vilana's business.
45. Chris Richardson testified, and the Court so finds, that he does not believe or knows of any evidence that would support the comments on Plaintiff's website regarding Vilana Financial related to "predatory loan practices" or "illegal" and "fraudulent conduct."
46. The Court finds that Vladimir Kazaryan confirmed that he met an individual named Michael Zubitsky and notarized his signature on the sales agreement in March of 2004.
47. Vladimir Kazaryan testified, and the Court so finds, that Vilana Financial did not have a negative reputation in the community until the publishing of the disparaging comments contained on Plaintiff's website.

48. Vladimir Kazaryan testified, and the Court finds, that Kazaryan left Vilana as a result of the comments contained on Plaintiff's website and the negative effect it was having on the company's business and its reputation.

49. Vladimir Kazaryan testified, and the Court finds, that he did not attempt to challenge the complaint served by Plaintiff on the Minnesota Department of Commerce in relation to his status as a notary for fear of being embroiled in a lengthy and costly dispute requiring legal representation that would not justify the maintenance of a his status as notary and therefore he agreed to its surrender.

50. Betty Tucker, a loan officer with Vilana Financial since early 2005, testified, and the Court finds, that Vilana Financial lost numerous employees and customers as a result of the comments published by Plaintiff on his website, which created a financial loss for Vilana Financial both in terms of investment in employee training and lost revenue from customers terminating or foregoing their relationship with the company.

51. The Court finds that as a result of Plaintiff's tactics, numerous people lost their jobs or left the employ of Vilana Financial because of the negative effect the website was having on the company.

52. The Court finds that Vilana Financial presented financial data to the Court representing its lost revenues for the period of June 2005 through October 2007, which showed a total loss of business income along with a loss related to the training of new employees for the period, at $7,662,218.68. Andrew Vilenchik, Vilana Financial's President testified, and the Court finds that 15% of the total loss figure, or $1,149,000, is directly attributable to the conduct of Plaintiff.

53. The Court finds that Plaintiff has allowed others, such as Zac and Mary, to use image 2891 free of charge in exchange for a link back to his website.
54. The Court finds that Plaintiff on April 30, 2004, charged Minneapolis/St. Paul magazine $150.00 for the magazine's use of image 2891in its press run of 75,000 magazine issues.
55. The Court finds that Plaintiff between January, 2004 and the present, has never charged more than $7,500 for any unauthorized use of his photographs. Plaintiff further testified, and the Court finds, that Plaintiff's total gross income from his photography business as a whole for each of the years 2004, 2005, and 2006 did not exceed $15,000.00 per year.
56. The Court finds that Plaintiff has sought the "maximum damages" from Vilana Financial because he was unhappy with the way Vilana Financial "handled the matter" related to the use of image 2891.
57. The Court finds that Plaintiff placed the water mark phototourminneapolis.mn.us on images 2258 and 2891.
58. The Court finds that Vilana Financial did not remove the phototourminneapolis.mn.us mark or any other imbedded information, prior to the use of the images 2258 and 2891 in its advertising.
59. The Court finds that according to the licensing fees set forth on Plaintiff's cgstock.com website, the total charges for all commercial advertising use made by Vilana Financial, as set forth on Plaintiff's Exhibit 24 in relation to image 2891, totals $1756.00, had the use been authorized by Plaintiff in advance.

CONCLUSIONS OF LAW

1. Plaintiff's Damage Allegations

The damages demanded by Gregerson in this matter are entirely inconsistent with the fees demanded by Gregerson in other settings which range from $150 - $7,500, or charged to the MSP Communications ($150.00 for a press run of up to 75,000 copies) for the very same photograph (#2891) at issue in this case. (Ex. D12). The prices set forth on Plaintiff's website limit the totality of the award to just under $2000.00 ($1996.00 to be exact) based on the use of both images 2891 and 2258 by Vilana Financial in accordance with Plaintiff's own Exhibit 24. Plaintiff has not provided any evidence warranting a departure from the types of damages usually recovered by Plaintiff to an award of the exorbitant amounts he now claims he is entitled to as damages.

Plaintiff seeks statutory damages for copyright infringement under 17 U.S.C. § 504(c)(2) as to image 2258. Plaintiff has the burden of proving that Defendants willfully infringed upon his copyright to image 2258 for purposes of assessing statutory damages. Arclightz and Films Pvt. Ltd. V. Video Palace Inc., 303 F. Supp.2d 356 (S.D.N.Y. 2003). To establish willful infringement warranting the award of statutory damages, Plaintiff must prove that Defendant acted with actual or constructive knowledge that its conduct is in violation of Plaintiff's copyright. Bly v. Banbury Books, Inc., 638 F.Supp. 983, 986 (E.D. Pa., 1986). See also RSO Records, Inc. v. Peri, 596 F.Supp. 849 (S.D.N.Y. 1984). Plaintiff has not submitted any evidence, direct or otherwise, that Defendants acted with knowledge that they were infringing his copyright when they used image 2258 as part of a company brochure the summer of 2004. The testimony and evidence suggest that Defendants were unaware that image 2258 belonged to Plaintiff at the time of the alleged use and did not become aware of a possible infringement until production of the brochure on or about January 2007, in the discovery stage of this litigation. Without his burden of proof in showing a willful infringement by Defendants, Plaintiff is not entitled to an award of statutory damages under 17 U.S.C. § 504(c)(2).

Plaintiff's recovery with respect to image 2891 is limited to the actual damages sustained by Plaintiff as a result of Defendants' unauthorized use of his photo because of his failure to register it as a copyright prior to its use by Vilana Financial. Exhibit 17(a) (Stock Photo Licensing Fees displayed on cgstock.com) provides a vivid synopsis of the fees regularly charged by Plaintiff for his stock photo images. According to the licensing fees set forth on Plaintiff's cgstock.com website, the total charges for all commercial advertising use made by Vilana Financial, as set forth on Plaintiff's Exhibit 24 in relation to image 2891, totals $1,756.00, had the use been authorized by Plaintiff in advance. This figure is consistent with the $1,816.00 actual claimed damages by Plaintiff in his June 6, 2005 letter to Vilana Financial. Plaintiff at trial asserted a claim for $4,462.00, as part of his actual damages in relation to image 2891.

Over and above the actual damages Plaintiff asserts a 10X multiplier as a "penalty" for unauthorized use of the image. The penalty must be disregarded by the Court as it does not pertain to Plaintiff's actual damages and therefore, Plaintiff is entitled to the actual damages as derived from his website of $1,756.00, which can be directly attributed to his lost profits. See, Baker v. Urban Outfitters, Inc., 254 F.Supp.2d 346 (S.D.N.Y.2003)(holding that photographer, asserting copyright infringement from picture frame manufacturer's unauthorized use of stock photograph, could not properly include moral debt owed to person pictured in his actual damages calculation); Bruce v. Weekly World News, Inc., 150 F.Supp.2d 313 (D.Mass.2001) (holding that photographer whose copyrighted picture was used without permission on entertainment tabloid's promotional t-shirts was not entitled, in addition to portion of tabloid's profits, to royalty for each shirt sold; award would be duplicative of profits damages and payment of royalties on promotional items was contrary to industry practice); and, Landau v. Cosmetic and Reconstructive Surgery Center, Inc., 158 F.R.D. 117, (N.D.Ill.1994)(holding that Photographer's affidavit, and declaration of purported expert in photographic technique and aesthetic value lacked sufficient particularity to support claim of $25,000 in damages for copyright infringement of photograph by doctor and cosmetic surgery center).

Plaintiff further claims that Defendants removed his copyright management information from images 2258 and 2891 in violation of 17 U.S.C. § 1202(b)(1) and (3). In order to establish a claim for removal of copyright management information, Plaintiff must prove that (1) Defendants intentionally removed or altered any copyright management information; or (2) distributed or imported for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or (3) distributed, imported for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law. See, 17 U.S.C. § 1202(b).

Copyright management information means any information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, the title and other information identifying the work, including the information set forth on a notice of copyright, the name of, and other identifying information about, the author of a work, the name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright. 17 U.S.C. § 1202(c)(1) – (3).

In is undisputed that the only copyright management information (watermark) that was directly visible to the public in regards to images 2891 and 2258 was the link for Plaintiff's website www.phototour.minneapolis.mn.us. This little bit of information does not qualify as copyright management information under 17 U.S.C. § 1202(c)(1) – (3). The Court in IQ Group, LTD., v. Wiesner Publishing, LLC., 409 F. Supp.2d 587 (D.N.J. 2006), held that neither advertiser's logo, nor associated hypertext link to copyright information on advertiser's website, were "copyright management information," and thus their removal before advertisement was sent out by competitor did not violate Digital Millennium Copyright Act (DMCA); removed information did not function as components of automated copyright protection or management system. At relevant times herein, the above referenced website was a not-for-profit website dedicated to the free use and exchange of photographs. Plaintiff himself has admitted that the information contained on image 2891 and 2251, at the time of their alleged use did not suffice to place the public on notice as to the copyright owner of the images. Plaintiff has replaced the www.phototour.minneapolis.mn.us watermark with www.cgstock.com and has added "© Chris Gregerson," and the year of the copyright for both images.

Given the lack of qualification of his claim under 17 U.S.C. § 1202(b), Plaintiff attempted to present evidence for the first time at trial regarding imbedded copyright information in the digital image itself, he claimed was available on his website. However, Plaintiff did not present any expert evidence or testimony as to the existence of this copyright information on the specific images at issue at the time of their use nor was any evidence presented as to the removal of said imbedded information or how and when that was accomplished. The intent of the statute is to openly communicate ownership information to the public to prevent unintended or unknowing use of another's copyright and to facilitate an efficient internet marketplace. IQ Group, LTD., v. Wiesner Publishing, LLC., 409 F. Supp.2d at 596. Allowing Plaintiff to recover based on speculative and limited evidence of imbedded information would directly contradict the purposes of the Digital Millennium Copyright Act which requires an intentional act on the part of the Defendant.

2. Counterclaims of Vilana Financial, Vilana Realty and Andrew Vilenchik

Defendants Vilana Financial and Vilana Realty assert a counterclaim against Plaintiff for Deceptive Trade Practices in violation of the Minnesota Deceptive Trade Practices Act, Minnesota Statute Section 325D.44. A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, the person disparages the goods, services, or business of another by false or misleading representation of fact, or engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding. Minn. Stat. § 325D.44, subd. 1 (8) (13).

Plaintiff has engaged in Deceptive Trade Practices against Defendants in violation of Minnesota Deceptive Practices Act, Minnesota Statute section 325D.44, subdivision 1 by disparaging the services and business of Vilana Financial and Vilana Realty by false or misleading representation of fact and engaging in other conduct which similarly creates likelihood of confusion or of misunderstanding. Through his stock photography website, Plaintiff intentionally disseminates content about Vilana Financial and Vilana Realty by suggesting that the business are owned by members of the Russian mafia, and are actively engaged in fraudulent and illegal business conduct, as well as predatory lending practices. None of these statements are true or have been shown to be non-misleading by Plaintiff. Furthermore, it is undisputed that Plaintiff has intended and has succeeded in causing damage to the business of both Vilana Financial and Vilana Realty.

Vilana Financial and Vilana Realty have asserted at trial that Plaintiff has interfered with their existing and prospective contractual and business relationships. The false, misleading and disparaging content on Plaintiff's website has induced other third persons not to enter into, or continue, relations with Vilana Financial and Vilana Realty. Further, other third parties advised other prospective customers not to conduct business with Vilana Financial and Vilana Realty. At the same time, other entities conducting business with Vilana have noticed a decline in the business since Plaintiff set up his website campaign against Vilana Financial and Vilana Realty. Vilana Financial and Vilana Realty have experienced a decline in their business activity as a result of Plaintiff's interference with their customers.

Under Minnesota law, one who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982) (citing Restatement (Second) of Torts § 766B (1979)); *Oak Park Dev't Co., Inc. v. Snyder Bros. of Minnesota, Inc.*, 499 N.W.2d 500, 506 (Minn. Ct. App. 1993).

Plaintiff has intentionally diverted customers, disseminated information and posted content about Vilana Financial and Vilana Realty on his stock photography website to induce other third persons not to enter into, or continue, relations with Vilana Financial and Vilana Realty. For example, on Plaintiff's web log forum, there is a posting dated November 4, 2005, from an individual by the name of Anne Sawyer-Aich in Minneapolis that states, in pertinent part, "[i]n the meantime, I intend to let all my family and friends know about Mr. Vilenchik's theft, and to discourage them from doing any business with Vilana Financial." This comment was made in response to Plaintiff's statement that "Vialna Financial offers debt consolidation loans, home financing, foreclosure bailouts, and other major financial transactions. Based on the events described above, I believe Vilana Financial can't be trusted to act in good faith or be honest." Plaintiff filters and allows "Anonymous" postings on this web log that make unsupported statements like, "Vilenchik and Vilana are idiots, greedy and dishonest idiots – never do any business with Vilenchik."

In addition to the posts on Plaintiff's web log, other individuals in business with Vilana Financial and Vilana Realty believe Plaintiff's websites and web log is diverting customers away from Vilana Financial and Vilana Realty and causing confusion. For example, Pauline Fischer, an account executive with Stewart Title, a company that oversaw closings for Vilana Financial, testified that based on her subsequent searches and inquiries, she believes that there is confusion amongst customers and individuals in the mortgage real estate business with respect to Plaintiff's website and the nature and purpose of the content involving Vilana Financial, which is detrimental to Vilana Financial and very hard to overcome given the competitive nature of the industry.

Ms. Fischer's reactions to Plaintiff's website are from the perspective of a company assisting Vilana Financial and Vilana Realty on the business end of matters; individual clients of Vilana Financial are also influenced and confused by Plaintiff's website. Betty Tucker, a loan officer with Vilana Financial since early 2005, testified that Vilana Financial lost numerous employees and customers as a result of the comments published by Plaintiff on his website, which created a financial loss for Vilana Financial both in terms of investment in employee training and lost revenue from customers terminating or foregoing their relationship with the company. Finally, Plaintiff has disparaged Vilana Financial in several emails to third parties, including but not limited to City Pages magazine, wherein he referred to Vilana as a company which is "a front for criminal financial exploitation of people" and which is run by an individual who is "extremely corrupt and unethical," referring to Andrew Vilenchik.

These facts demonstrate that Plaintiff's intent since September 3, 2005, the date of Plaintiff's first post to his stock photography website has been to interfere with the business of Vilana Financial and Vilana Realty. Accordingly, Vilana Financial and Vilana Realty suffered monetary damages as a result of Plaintiff's website content and his tactics in diverting potential and existing customers to the content meant to cause them harm.

Vilana Financial, Vilana Realty and Andrew Vilenchik assert a counterclaim against Plaintiff for invasion of privacy by appropriation of Vilana's name and Vilenchik's likeness. Appropriation protects an individual's identity and is committed when one "appropriates to his own use or benefit the name or likeness of another." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998) (citing Restatement (Second) of Torts § 652C). Although this law is "relatively undeveloped" in the State of Minnesota, the Restatement explains that "the protection of . . . personal feelings against mental distress is an important factor leading to a recognition of the rule." *Kovatovich*, 88 F.Supp.2d at 987; Restatement (Second) of Torts § 652C. The right is also invaded when a person's name or likeness is used "to advertise [the tortfeasor's] business or product, or for some similar commercial purpose … [but] is not limited to commercial appropriation." Restatement (Second) of Torts § 652C.

Plaintiff invaded Andrew Vilenchik's privacy by appropriating his likeness and name to his own use or benefit. First, Plaintiff established an internet site and web log devoted to Andrew Vilenchik, Vilana Financial, and Vilana Realty. This site, which incorporates the Vilana

Financial and Vilana Realty names and Service Marks into its domain names and meta-tags, is attached to and accessible through Plaintiff's commercial photography business home page on the internet. As such, it draws potential Vilana customers to Plaintiff's photography page when those potential customers use a search engine, such as Google or Yahoo, to locate the Vilana Financial and Vilana Realty businesses. This in turn generates additional attention for Plaintiff's stock photography business and correspondingly distracts and diverts interest away from the Vilana companies. By monopolizing on Vilana Financial's and Vilana Realty's advertising efforts and notoriety, Plaintiff attracts attention and business to his own internet business. Accordingly, Plaintiff wrongfully appropriates the Vilana Financial and Vilana Realty names.

Plaintiff also invaded Andrew Vilenchik's privacy by appropriating his likeness by capturing and publishing Vilenchik's image without his approval or authorization. Despite repeated demands to Plaintiff to remove the photograph, Mr. Vilenchik's photograph continues to remain posted on the website. Plaintiff's intent in using Andrew Vilenchik's name and likeness serves no other purpose than to inflict mental distress and cause harm to his reputation.

Defendants presented evidence at trial demonstrating that Plaintiff's violation of the Deceptive Trade Practices Act, appropriation of defendants' trade names and likeness and interference with contractual relations has resulted in damages in the amount of $1,149,000. The damages are derived from evidence presented by defendants in the form of financial data demonstrating its lost revenues for the period of June 2005 through October 2007, which showed a total loss of business income along with a loss related to the training of new employees. This amount representing 15% of the total loss ($7,662,218.68) is directly attributable to the conduct of Plaintiff.

Vilana Financial and Vilana Realty assert a counterclaim against Plaintiff for an injunction. Defendants assert that they have suffered irreparable harm and will continue to suffer irreparable harm as a result of Plaintiff's continued operation of his website specifically devoted to Defendants. The evidence presented at trial and the testimony of witnesses supports long term injunctive relief. It is undisputed that the nature and content of Plaintiff's webpage devoted to Defendants causes great harm, which Plaintiff is in no position to compensate them for financially. People are loosing their jobs and a company is being forced out of business during a critical period within the mortgage and real estate industry as a whole. Injunctive relief is warranted and a separate hearing on the matter should be held by the Court to determine the exact extent of the restrictions to be place on Plaintiff.

ORDER

Based on the Court's Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that:

1. Judgment is ordered entered in favor of Plaintiff's in the amount of $1996.00.

2. Judgment is ordered entered in favor of Defendant's in the amount of $1,149,000.00.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: December ____, 2007

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Honorable Ann Montgomery
Judge of the District Court